
U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges

Date: February 25, 1993
Case No.: 92-ERA-37

In the Matter of

GREGORY A. SPRAGUE

Complainant

v.

AMERICAN NUCLEAR RESOURCES, INC.

Respondent

Appearances:

David P. LaForge, Esq.

For Complainant

Kevin M. McCarthy, Esq.

For Respondent

Before: DANIEL J. ROKETENETZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

STATEMENT OF THE CASE

This case arises under Section 210 of the Energy Reorganization Act of 1974, (hereinafter the "Act") 42 U.S.C. §5851, as implemented by the regulations at 29 C.F.R. Part 24. The Complainant, Gregory A. Sprague, filed a claim with the

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United States Department of Labor on April 21, 1992, alleging that the Respondent, American Nuclear Resources (ANR), terminated him on the basis of his request for a radiation report from the Nuclear Regulatory Commission (NRC).

On May 19, 1992, after an investigation, the Department of Labor determined that the Respondent made the decision to terminate the Complainant before he contacted the NRC, thus, there was no violation of Section 210 by the Respondent. The Complainant contested this finding by making a timely request for a hearing before an Adminis- trative Law Judge. A formal hearing took place on September 15, 1992, in Kalamazoo, Michigan. It has been stipulated that ANR is a contractor for the D.C. Cook Plant, a Nuclear Regulatory licensee, that the Complainant was an employee of ANR, and that ANR is subject to the provisions of the Act.

The Complainant seeks back pay from the time he was discharged as well as "front pay" for the period of time he could have continued to be employed had he not been terminated by the Respondent. Additionally, the Complainant seeks reimbursement for attorney fees and expenses incurred in connection with the filing of his complaint. No compensatory damages are sought.

ISSUES

The issues in this case are:

1. Did the Complainant's contact with the NRC constitute protected activity under the Act?
2. Was the Respondent aware of the contact between the NRC and the Complainant prior to terminating the Complainant?
3. Did the Respondent unlawfully terminate the Complainant because of his contact with the NRC?
4. Was the Complainant's employment unlawfully terminated due to any other protected activities?

Based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, case law and post-trial briefs, I hereby make the following:

FINDING OF FACTS AND CONCLUSIONS OF LAW

BACKGROUND:

American Nuclear Resources (ANR) is a contractor for D.C. Cook Nuclear

Reactor Plant, located at Bridgman, Michigan. (Tr. 37)[1] The business office of ANR is located approximately ten miles from the D.C. Cook Plant. ANR hired the Complainant, Gregory Sprague in January, 1992, as a tool accountability technician. (Tr. 14) It was explained to Sprague when he was hired, that the work would be intermittent but that it was expected to continue until the following September. (Tr. 16) After completing a training program in February, he began working at the plant on March 5, 1992. (Tr. 15; 43) As a tool accountability technician, Sprague's duties were to monitor any tools and materials that came into the reactor containment area to ensure that no objects fell into the cavity. (Tr. 42) ANR paid Sprague seven dollars an hour. (Tr. 15) March 20, 1992, was Sprague's final day of work for ANR. (Tr. 16) The Complainant was still a probationary employee when he was terminated. (Tr. 85)

Sprague's immediate supervisor was Georgia Emanuel. Ms. Emanuel was the acting supervisor of the tool accountability crew for ANR and she occupied this position at all times relevant to this proceeding. (Tr. 42) Emanuel described the duties of a tool accountability technician as monitoring "anything and everything" that comes into containment, and "keeping track of whether it be tools, bottles, whatever it is, along with making sure the same, the items go back out." These duties occur from "the time that the reactor head is lifted and set on the stand until the time the reactor head is put back on the core * * *." (Tr. 42)

On March 19, 1992, according to Emanuel, the Radiation Protection employees (RP's) had poured water out of the containment cavity. The RP's started spraying down the walls of the cavity to prevent radiation from going airborne, but in Emanuel's opinion "they waited too long" to do so. (TR 51) Sprague apparently volunteered to stay in the containment area to pick up tools. The other tool accountability crew members left the area. Emanuel, upon being informed of the situation, went to the area. She was told by an RP that she would have to leave the area. She responded that she would stay until she finished her business with her crew. (TR 51) According to Emanuel the contamination had spread to outside the containment area because of people tracking it all over on their feet. Clean up continued off and on all day long. (Tr. 52)

Emanuel testified that later that day, while she was sitting in her office with one of the other crew members, Sprague came into her office and started yelling about "the stupid RP's not knowing what they were doing." (Tr. 52) Emanuel told Sprague not to yell at her and he proceeded to tell her that after he came out of containment he set off the monitors which revealed that his forearm and hand were contaminated. After Sprague washed his hand and arm and changed his clothing, "he was fine." (TR 53) The person identified by Emanuel as being with her in her office when this yelling incident occurred (a crew member named Nicole) was not called as a witness. Sprague denied that he yelled at Emanuel. (Tr. 119)

Sometime during the day on March 19, Emanuel had also determined the need to temporarily lay off four of the twelve tool accountability employees, including Sprague.

(Tr. 54) Although Emanuel had intended to recall Sprague she began to rethink her decision after the "yelling" incident that day. (Tr. 54) In that regard she spoke to her superior, Rich Smith,

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the site superintendent who indicated that he would approve Sprague's permanent lay off based on Emanuel representations that he was "loud and nobody really cared to work with him." (Tr. 55) Emanuel remained undecided, however, stating that she was "the type of person that is willing to give somebody a second chance." (Tr. 53) The scheduled lay off was to be two to three weeks. (Tr. 56)

The next day, on March 20, 1992, Sprague reported for a final body count prior to starting his lay off. According to Sprague, he accompanied Emanuel and the other laid off employees to the training center to be checked out. While waiting, Emanuel and one of the other crew members left the area, but Emanuel left the lay off notices on the chair next to Sprague. He testified that he picked them up and looked through them. There were four such notices, one for each of the four. laid off individuals, which included Sprague, Sheya Atteberry, Michael Gantt and Amy Scrima. In the section captioned "Eligible for Rehire" were the words "Please do not destroy badge. Will be returning." (Tr. 18-19; Def. Ex. 1) Emanuel testified, however, that the lay off slip for Sprague taken to the training center only noted that he was eligible for rehire because the "yes" was circled, but that the words "Please do not destroy badge. Will be returning." were not on Sprague's lay off form. Emanuel stated that she was still unsure about recalling Sprague back to work because of the yelling incident the day before. (Tr. 63) No testimony was elicited from Emanuel that she did not leave the lay off forms on the chair next to Sprague during her temporary absence from the training center.

Shortly thereafter, each of the laid off employees underwent a "full body count." A full body normally takes two minutes (Tr. 121) Atteberry, Gantt and Scrima were released. However, Sprague tests were abnormally high. As a result, he spent two hours undergoing tests to determine the extent of contamination. (Tr. 17)

Emanuel testified that when the RP's were in the process of conducting the full body count, Sprague responded by hollering at the RP's. She testified that Sprague persisted in "screaming" at the RP's for approximately one hour. (Tr. 59) According to her, during her tenure as supervisor, other employees have tested positive for contamination, but none have reacted so belligerently. (Tr. 88, 89, 90) Emanuel believes that each of the four employees, including Sprague, received a copy of the exposure reports, which are documents that explain the results of the body count test in laymen's terms. (Tr. 60) She also heard Sprague ask for a copy of the body count, but she explained to him that he had a right to the exposure report but not the body count. (Tr. 88, 89)

In an attempt to ascertain why Sprague was receiving such a high reading the RP's repeated the tests five or six times. (Tr. 121) They concluded that the contamination was

internal. (Tr. 17) Sprague testified that he did not become belligerent with the RP's, but he did express concern. The RP's told him not to worry, that the contaminants would flush out of his system shortly. (Tr. 122) At this point, Sprague requested a copy of the body count report. The RP's refused his request. (Tr. 17, 30, 123)

After she observed Sprague's conduct with the RP's during the testing

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procedure, Emanuel decided to permanently terminate his employment. With regard to the lay off document that she had to fill out for Sprague, it is her testimony that the form indicating that Sprague was terminated, which was submitted into evidence, is a different one than the one Sprague examined. She had partially completed a lay off document on three occasions because of her uncertainty in discharging Sprague permanently. She stated that she was unhappy with his attitude, but at the same time she did not want to retrain a new employee. (Tr. 61-63, 71, 75-76) On March 19, she filled out the first form on which she indicated that Sprague would be eligible for rehire and wrote, "Please do not destroy badge." (Tr. 61-63, 75, 76) On the second form, which she started to complete on the morning of March 20, she had simply indicated that he was eligible for rehire and nothing more. This was the form that she contends that she brought with her to the training office. (Tr. 61-63) After the incident on March 20, she discarded the second form. On the third and last form she indicated that Sprague would not be rehired because of his "poor work quality and bad attitude." (Tr. 61-63; Def. Ex. 1) Sprague was not informed that his lay off would be permanent.

When Sprague went home on March 20, he was still concerned about his exposure level, so he contacted the Nuclear Regulatory Commission and spoke with Mr. James Isom. Sprague inquired whether he was entitled to a copy of the full body count. Isom said that he would have to find out whether this report could be released. Shortly thereafter, Isom called Sprague to inform him that the report would be sent. (Tr. 17, 125) Sprague subsequently received the copies attached to a letter from Mr. Isom who wrote that it was his understanding, based on the nuclear regulations, that an employer was not required to give an employee the body count reports. Sprague stated that he did not know who Isom contacted concerning his request. (Tr. 125; PI. Ex. 1)

On Friday, March 27, Sprague went to the ANR business office to pick up his check. Attached to his paycheck was a notice informing him about upcoming safety meetings. (Tr. 20) The following Monday, Sprague called Emanuel but she was unavailable. She failed to return his call, so he called again the next morning. (Tr. 21) Emanuel told Sprague not to worry about the safety meetings and that he did not have to attend. (Tr. 21) During this conversation, Sprague asked how long the lay off would continue. Emanuel responded that not everyone may be called back to work. Sprague then inquired as to whether he would be returning and she indicated that she was not sure, "* * * because of the way things were handled." (Tr. 21) Approximately a week later, Sprague called the personnel office and spoke with Mike Smith who informed him that ANR

would no longer be needing him. When Sprague asked why he had been fired, Smith answered, "They did not say. They just said that they did not need you." (Tr. 22)

Regarding the phone conversation Emanuel had with Sprague on March 27, she explained that she did not tell Sprague that his employment was terminated because it was the responsibility of the personnel office to communicate such information to employees. (Tr. 65, 84) However, Emanuel was unable to recall if she told Sprague to contact personnel. (Tr. 85) She also maintained that the personnel office had mistakenly attached a safety meeting schedule to his last paycheck. Emanuel conceded that she never warned Sprague about the consequences of his poor be- havior prior to his termination. (Tr. 86) She also testified that at no time had she spoken with an administrator from the NRC and she was completely unaware that Sprague had contacted the NRC

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until the suit against ANR was filed. (Tr. 63, 64, 87)

Discussion.

At the outset I note that on October 9, 1992, Congress passed H.R. 776, the Comprehensive National Energy Policy Act, which was signed into law by the President on October 24, 1992. This Act contains several significant amendments to the whistle blower provisions of the Energy Reorganization Act of 1974, § 5851 under which this case arises. Included among those amendments are explicit coverage of internal complaints of employees as protected activity as well as modifications to the burden of proof analysis. The amendments, however, have application only to complaints filed after their enactment. Therefore, the case *sub judice* is decided on the basis of the statutes and relevant case law as it existed prior to the statutory amendments.[2]

The relevant provisions of the Energy Reorganization Act are found at 29 U.S.C. § 5851, and provide as follows:

> Employee Protection
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> Sec. 210 (a) No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission license or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-
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> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended; (2) testified or is about to testify in any such proceeding or; (3) assisted or participated or is about to assist or participate in any manner in such a

proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

In its post-hearing brief the Respondent argues in essence, that the Complainant cannot prevail because the Complainant did not participate in any Nuclear Regulatory Commission (NRC) proceeding, that the complainant's NRC contact was after the decision to terminate his employment and that, in any event, the Respondent was unaware of any NRC contact by the Complainant until the filing of the Complaint in this case. The Respondent also appears to contend, or perhaps simply fails to recognize, that the Complainant's activities prior to his NRC contact, which led to his termination, were such that they were protected by the Act.

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The purpose of the "whistleblower" provision of the Act is to "prevent the [investigating agency's] channels of information from being dried up by employer intimidation." *Deford,* 700 F.2d 281, at 286 (6th Cir. 1983), quoting *NLRB v. Schrivener,* 405 U.S. 117, 122, (1972). To keep in line with this goal the statute should be read broadly. An employee does not have to prove that he gave unique evidence to the NRC, nor does the information he relays have to be material that his employer wants hidden. *Deford,* 700 F.2d 281, at 285. Further, the statute has been interpreted to shield employees who make internal complaints. The assertion that an employee's conduct is only protected when he has contact with an outside agency frustrates the intent of the Act. "A narrow, hypertechnical reading of § 5851 will do little to effect the statute's aim of protection." *Kansas Gas & Electric Company v. Brock,* 780 F.2d 1505, 1512 (1 Oth Cir. 1985). The intent behind § 5851 is not "merely to prevent employers from inhibiting disclosure of particular facts of types of informa*tion." Deford,* 700 F.2d at 286. For example, the protected activity does not have to be the sort where an employee is putting forth information. See, for example, *Lockert v. United States Department of Labor,* 867 F.2d 513, 518 (9th Cir. 1989) where the court accepted the Secretary's determination that researching industry codes is protected activity under certain circumstances.

Reporting safety and quality problems internally to one's employer is a protected activity under the Energy Reorganization Act. *See Mackowiak v. University Nuclear Systems, Inc.,* 735 F.2d 1159(9th Cir. 1984); *Kansas Gas & Electric Co. v. Brock, Supra.*

In Brown & Root, Inc. v. Donovan, 747 F.2d 1079 (5th Cir. 1984), the Fifth Circuit held that the filing of an intracorporate quality control report is not protected activity under the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (a) (3). The Secretary of Labor, however, has declined to follow *Brown & Root,* even within the Fifth Circuit. *See Hasan v. Nuclear Power Servs, Inc, 86ERA-24 (Sec'y June 26, 1991); Bivens v. Louisiana Power & Light,* 89-ERA-30 (Sec'y July 26, 1988); *Willy v. The Coastal Corporation, 85-CAA*1 (Sec'y June 4, 1987).

Accordingly, I reject the Respondent's argument that the Complainant's lack of NRC contact prior to the decision to terminate him precludes a finding of a violation of the statute.

It appears that the Complainant, at least until the trial of this case took place, believed that the decision to terminate him was made sometime after he contacted the NRC on March 20. However, I am convinced that Emanuel, with the approval of her supervisor, Richard Smith, determined on March 20, 1992, to terminate the Complainant's employment, prior to his NRC contact. The Complainant's post-hearing brief ably addresses the misperception of facts and he now argues that the NRC contact is irrelevant if the Respondent was terminated for other reasons proscribed by the Act. That the Complainant thought he had been terminated because of his NRC contact is readily understandable. He had not been told on March 20 that he

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was being permanently laid off. On the contrary, he had seen a lay off slip prepared by his supervisor which indicated, at the very least, that he was to be recalled to work. Moreover, on March 27 he received a notice of a safety meeting with his pay check. On the same day, in a conversation with Emanuel, she did not inform Sprague that he would not be recalled. When Sprague later learned that he was "no longer needed," he obviously assumed that it was because of his earlier contact with the NRC.

A prima facie case requires a showing sufficient to support an inference of unlawful discrimination, *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089 (1981). To establish a *prima facie* case, the complainant must show that he or she engaged in protected activity, that he or she was subject to adverse action, and that the employer was aware of the protected activity when it took the adverse action. *Lany v. Detroit Edison Co.,* 86-ERA-32 (Sec'y June 28, 1991). The complainant also must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Direct evidence is not required for a finding of causation. The presence or absence of a retaliatory motive is provable by circumstantial evidence, even if witnesses testify that they did not perceive such a motive. *Ellis Fischel State Cancer Hosp. v. Marshall,* 629 F.2d 563, 566 (8th Cir. 1980), cert. denied, 450 U.S. 1040 68 L.Ed.2d 237, 1 01 S.Ct. 1757(198 *1). Accord, Mackowiak v. University Nuclear Systems Inc.,* Supra.

The Complainant contends on March 20 that he was engaged in protected activity when he questioned the RP's about the levels of radiation detected and when he requested and was refused a full body count report from the PR's. This issue will be discussed momentarily. The easier elements of establishing a *prima facie* case are present here; specifically, the Complainant was subject to adverse action, and the Respondent was aware of the protected activity when it took the adverse action. Here Emanuel testified that the reason that precipitated her decision to permanently lay off Sprague was for his activities with the PR's which, in her opinion, constituted unacceptable conduct.

Undeniably, Emanuel was aware of the activity, although it appears that she may not have been aware that it may have been protected. The record in this case clearly supports a finding that the Complainant requested a full body count report from the PR's out of concern for his safety. Moreover, I find that his concern about radiation levels was a valid one, as his readings were abnormally high. Further, since this was the first time Complainant worked in the nuclear industry it is not unreasonable to infer that he may have been more sensitive to an abnormal deviation from acceptable readings. It would dis- serve the protective purposes of the Act if an employer was free to fire an employee for requesting information concerning the amount of radiation to which he had been exposed, or, in this case because he asked for the information in a manner deemed unacceptable to the Respondent. I find that Sprague's questioning of the PR's was a legitimate health and safety concern which afforded him the protection of the statute.

The next question is whether Sprague's conduct and his criticism of the PR's, directly to them and later to Emanuel, was such as to remove it from the protection of the Act. In his posthearing brief the Complainant argues that his conduct was not so unduly

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disruptive or indefensible on its face that it would lose its protected status under the Act. I agree. It is not difficult to imagine that a person undergoing two hours of testing for radioactive contamination, with the potential consequences therefrom, rather than being glowingly warm, polite and cordial, might actually get a little annoyed, even upset.

The Secretary of Labor has recognized that "intemperate language..... impulsive behavior" and even alleged "insubordination" often are associated with protected activity:

> In general, employees engaged in statutorily-protected activity may not be disciplined for insubordination so long as 'the activity (claimed to be insubordinate) is lawful and the character of the conduct is not indefensible in its context.' The right to engage in statutorily-protected activity permits some leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect in its business by correcting insubordinate acts. A key inquiry is whether the employee has upset the balance that must be maintained between protected activity and ship discipline. The issue of whether an employee's actions are indefensible under the circumstances turns on the distinctive facts of the case.

Kenneway v. Matlock, Inc., 88-STA-20, Sec'y of Labor, slip op. pp. 6-7 (June 15, 1989)

I find that the Complainant's behavior was not so indefensible so as to deprive him of the protection of the statute. Given the circumstances upon which the Respondent relies to justify Sprague's termination I find that his conduct did not rise to a level that impeded the orderly operation of the Respondent's business activities. In particular, the yelling incident of March 19 where Sprague allegedly criticized the RP's for permitting airborne contamination in the containment area is made less meaningful by Emanuel's own

criticism of the RP's made at trial when she testified that the RP's "waited too long" to spray down the walls and that they (the RP's) "could not figure out what was going on." (Tr. 51) Moreover, the fact that Sprague may have been upset at the RP's during his final body count, as noted above, is understandable and perhaps justified in view of the abnormality of his radiation readings. Because Emanuel found Sprague's behavior personally offensive does not detract from the protected nature of his conduct. In this regard, I also note that the Respondent failed to produce any of the RP's who were allegedly mistreated by Sprague.

Emanuel apparently included the above reasons in her conclusionary characterization of the reasons for Sprague's termination; ie., "bad attitude." In a strained attempt to buttress the plausi- bility of the reasons for Sprague's termination the Respondent presented the testimony of William Norton who was at the time of trial employed by ANR as a tool accountability technician. He testified that he worked with Sprague and that in his opinion, Sprague was pushy, abrasive and controlling. Norton stated that he found it difficult to get along with Sprague. (Tr. 113) However, Norton also testified that Sprague had never been rude to him and he had never seen Sprague act rudely to fellow employees.

Based on the foregoing and the record as a whole, I find that the Respondent's conduct did not warrant his termination not withstanding his protected activity. In making this finding, I note the lack of documentation of any complaints or disciplinary actions against Sprague, the absence of any warning to him that his conduct was unacceptable and the fact that his criticism was directed at non-employees of ANR, since the RP's were apparently employed by another contractor.

Likewise, I find the other expressed reason for Sprague's termination, namely, "poor work quality" to be equally meritless. Emanuel testified to a single incident that Sprague was logging items when there was no need to do so. After she spoke to him he "went about his business" (Tr. 48-49) At best this incident reflects a misunderstanding of procedure by Sprague, not an instance of "poor work quality." On the contrary, Sprague's insistence at logging everything in seems to be consistent with Emanuel's own testimony that tool accountability technicians "take care of monitoring anything and everything" (Tr. 42) and no disciplinary action was required. Furthermore, there were no other instances of "poor work quality" which compels the conclusion this reason was pretextual in nature. I so find.

Conclusion:

On the record before me I find that the termination of Gregory A. Sprague was in violation of Section 210 of the Energy Reorganization Act. Accordingly, I enter the following:

RECOMMENDED ORDER

1. That the Respondent make Gregory A. Sprague whole for any losses he may have suffered as a result of the Respondent's unlawful discriminatory lay off. In this regard, back pay is assessed from the date of lay off (March 20, 1992) and continuing thereafter until an offer of reinstatement is made to Sprague to his former or equivalent position of employment. Backpay is to be computed based on the average hours worked by tool accountability technicians over the period of time the Complainant would have been employed but for his unlawful termination. If the position no longer exists, back pay is to be computed to the date on which the position was eliminated. Backpay is to be offset by any interim earnings, but not by unemployment compensation received, as that is an obligation of the Complainant to repay.

2. Any adverse reasons stated in the Complainant's personnel file for termination shall be expunged and such reasons shall not be used against him in the event he applies for any future employment opportunities with the Respondent.

3. The Respondent is to reimburse the Complainant for all legal fees and expenses incurred in connection with this litigation. In that regard, the Complainant's counsel shall, within thirty (30) days of the date that this order becomes final, submit an itemized fee petition to

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the undersigned. Thereafter, the Respondent shall have thirty (30) days to submit any objections thereto.

4. The amount of back pay due to the complainant and the amount of attorney fees for which the Respondent will be liable will be determined in a Supplemental Decision and Order to be issued in due course after this order becomes final.

[ENDNOTES]

[1]References to the official transcript will be designated as (Tr. __); references to official exhibits will be designated as (Adm. Ex.__) for Administrative exhibits, (PI. Ex. __) for Complainant's exhibits and (Def. Ex. __) for Respondent's exhibits.

[2]I note, however, that the outcome of this case would not have differed under the recent amendments.